



# Air Force Materiel Command

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## AFMC Top Ten Training

## Organizational Conflict of Interest

November 2008



(2 Continuous Learning Points)



# OUTLINE

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- **OCI - IMPORTANCE**
- **TYPES OF OCI**
- **GOVERNING FAR PROVISIONS**
- **CURRENT GAO VIEW**
- **CONTRACTING OFFICER RESPONSILITIES**
- **MITIGATION PLANS**
- **FAR EXAMPLES**
- **PROVISIONS AND CLAUSES**
- **MISCELLANEOUS TOPICS**
- **OCI REFERENCES**
- **OCI - SUMMARY**



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# OCI IMPORTANCE



# Why Is Avoiding OCI Important?

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- **We need to maintain the trust of the American taxpayer**
- **Keep competition fair and objective**
- **Make people believe in the Government Procurement System**
- **An OCI violation will be a basis to overturn an award decision<sup>4</sup>**





# Why the interest?

- **Government is obtaining more service from contractors**
- **Defense Industry Consolidation**
  - Consolidation at prime level
  - Acquiring traditional A&AS contractors
  - Contracts calling for more exercise of judgment rather than merely supplying a good or service
- **A&AS support at other USAF/DoD organizations that may impact program**



**OCI rules in the FAR prevent the existence of contractor bias and unfair competitive advantage resulting from a contractor's conflicting roles.**



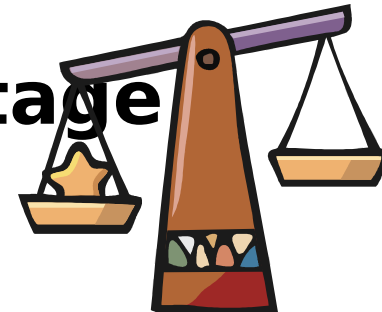
# **TYPES OF OCI**



# **What is an Organizational Conflict of Interest?**

**The existence of a set of circumstances in which a contractor may :**

- Be unable to render impartial advice to the government**
- Have impaired objectivity in performing work**
- Obtain an unfair advantage**





# What is an Organizational ~~Conflict of Interest?~~

## 3 Main Categories of OCI

- 1) Unequal Access
- 2) Biased Ground Rules
- 3) Impaired Objectivity







# Unequal Access

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- **This situation arises when a contractor has access to information not available to other contractors**
- **Example:**
  - Information on what the Government Estimate is could assist a company in winning a contract

(FAR 9.505-4)



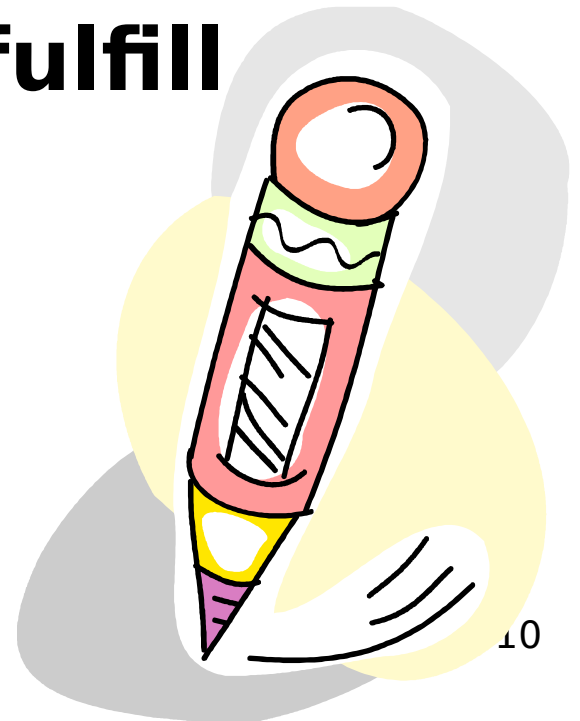


# Biased Ground Rules

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- **Occurs when contractor may be involved in writing Statement of Work (SOW) or technical direction efforts and then later seeks to submit a proposal to fulfill that requirement**

**(FAR 9.505-1 & 2)**





# Impaired Objectivity

- **Occurs when a support contractor performs duties involving assessing or evaluating itself or a partner company**



**(FAR 9.505-3)**



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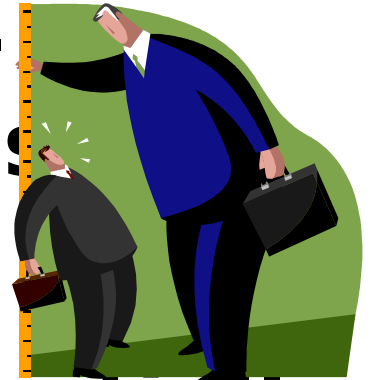
# GOVERNING FAR PROVISIONS



# Governing FAR Provisions

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- **FAR 2.101 OCI definition - Because of other activities or relationships ... , a person is unable or potentially unable to render impartial assistance or advice, or the person's objectivity ... is or might be impaired, or a person has an unfair competitive advantage.**





# Governing FAR Provisions

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- **FAR Subpart 9.5, Organizational and Consultant Conflict of Interest**
    - Likely to occur in:
      - (1) Management support services
      - (2) Consultant or other professional services
      - (3) Contractor performance of or assistance in technical evaluations; or
      - (4) Systems engineering and technical direction work performed by a contractor that does not have overall contractual responsibility for development or production
- (FAR 9.502)



# Governing FAR Provisions

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- **FAR 9.505 -**

**Contracting officers shall examine each potential OCI individually on the basis of its particular facts and the nature of the proposed contract**

***Access to non-public information?***

***Biased ground rules?***

***Will there be impaired objectivity?***





# Governing FAR Provisions

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- **FAR 9.504(a)(2) - Contracting officers need to avoid, neutralize, or mitigate significant conflicts of interest before award**
- **FAR 9.505 - Contracting officers are to exercise common sense, good judgment, and sound discretion**



**J&E Associates, Inc., B-278771, 98-1 CP D 77**





# Governing FAR Provisions

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- **FAR 9.504(b) -**



**Contracting officers should obtain the advice of legal counsel and technical experts in evaluating potential OCIs, as well as drafting necessary solicitation provisions and contract clauses.**



# **FAR Provisions - General Rules**

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- **FAR 9.505-1 - Providing Systems Engineering and Technical Direction**
  - **Contractor provides systems engineering and technical direction for a system but does not have overall contractual responsibility for development and integration. (Because these contractors occupy a “highly influential and responsible position” in providing advice to the Government, they should not be in a position to make decisions favoring their own products or capabilities)**
  - **Prohibits contractor from**
    - **Being awarded a contract to supply the system or any of its major components; or**
    - **Being a subcontractor or consultant to a supplier of the system or any of its major components.**



# **FAR Provisions - General Rules**

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- **FAR 9.505-2 - Preparing Specifications or Work Statements**
  - **Where contractor provided specifications for non-developmental items - may not compete to supply these items**
  - **But normal to select firms most advanced in field for developmental work**
    - **These firms can be expected to design and develop around their own prior knowledge**
    - **Creates unavoidable competitive advantage that is not considered unfair; hence no prohibition**



# **FAR Provisions - General Rules**

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- **FAR 9.505-3 - Providing Evaluation Services**
  - **A contractor is prohibited from evaluating its own offers for products or services, or those of a competitor, without proper safeguards to ensure objectivity to protect the Government's interests**
    - **See SAF/AQ Contract Policy Memo **07-C-03**, Use of Non-Government Personnel in Air Force Source Selections, dated 11 Jul 07**



# FAR Provisions - General Rules

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- **FAR 9.505-4 - Obtaining Access to Proprietary Information**
  - **Contractors who obtain access to proprietary data must protect data from unauthorized use**
  - **Usually requires company-to-company agreements to protect and properly use such data**
    - **Solicitations must list the contractors who will be used and provide notice to the prospective offerors that such contractor personnel will be used and the manner in which they will be used. The offeror must be given an opportunity to object to the release of their proposal information to those planned non-government personnel.**
    - **See SAF/AQ Contract Policy Memo [07-C-03](#), Use of Non-Government Personnel in Air Force Source Selections, dated 11 Jul 07**



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# **CURRENT GAO VIEW**



# Current GAO View

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- **Exchanges regarding an OCI issue or a mitigation plan are not considered to be discussions.** (See Overlook Systems Technologies, Inc., [B-298099.4](#), B-298099.5, November 28, 2006.)
- **Caution: Don't delay OCI resolution post-discussions because it may affect proposal evaluation and rating (e.g., change sub)**



# Current GAO View

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- **Greenleaf Construction Company, Inc.**, (B-293105.18, B-293105.19, January 17, 2006)
- **GAO held that the agency failed to reasonably consider or evaluate the OCI implications of payments to the awardee from a related work effort (real estate closing agent)**





# Current GAO View

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- **Alion Science & Technology Corp., ( [B-297022.3](#), January 9, 2006; [B-297022.4](#), B-297022.5, September 26, 2006)**
- **GAO initially held that the agency had not resolved an issue of impaired objectivity created by the awardee having existing contractual responsibilities.**
- **GAO stated agency had to document deliberation on OCI matters; agency later did so and ultimately prevailed**



# Current GAO View

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- **Science Applications International Corporation, (B-293601.3, May 3, 2004)**
- **Agency should have assessed the OCI implications in awarding a Systems Engineering and Technical Assistance (SETA) contract to a company which is regulated by the agency (in environmental support work).**



# Current GAO View

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- **Lucent Technology World Services, Inc.**, (**B-295462**, March 2, 2005)
- **GAO held that the agency had “broad discretion” to make an OCI determination**
- **Lack of OCI provisions in a specification development effort did not preclude an OCI exclusion in a later competition!**



# Earlier GAO Precedent

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- **Nelson Erection Company, Inc.,**  
(**B-217556**, April 29, 1985)
- **A contracting agency may impose a variety of restrictions, whether or not explicitly addressed in applicable procurement regulations, where the needs of the agency or the nature of the procurement dictates such restrictions.**



# Earlier GAO Precedent

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- **DZS/Baker LLC;Morrison Knudsen Corporation File ,**  
(**B-281224**, January 12, 1999, **B-281224-8**, 19 November 1999)
- In an A-76 cost comparison study, where 14 of 16 agency evaluators held positions under the study and thus were subject to being contracted out, a conflict of interest that could not be mitigated was created, and protests challenging the evaluators' conclusion that all private-sector offers were unacceptable was therefore sustained.



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# **CONTRACTING OFFICER RESPONSIBILITIES**



# **Contracting Officer Responsibilities**

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- **Using the general rules, procedures, and examples in FAR 9.5, contracting officers shall analyze planned acquisitions in order to -**
  - (1) Identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible; and**
  - (2) Avoid, neutralize, or mitigate significant potential conflicts before contract award.**

**(FAR 9.504)**



# **Contracting Officer Responsibilities**

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- **Contracting officers should obtain the advice of legal counsel in evaluating potential conflicts and in developing any necessary solicitation provisions and contract clauses**
- **Before issuing a solicitation for a contract that may involve a significant potential conflict, the contracting officer shall recommend to the HCA a course of action for resolving the conflict**
- **The contracting officer's judgment need be formally documented only when a substantive issue concerning potential organizational conflict of interest exists.**

**(FAR 9.504)**





# Contracting Officer Responsibilities

- Before determining to withhold award based on OCI considerations, the contracting officer shall notify the contractor, provide the reasons therefor, and allow the contractor a reasonable opportunity to respond.
- If the contracting officer finds that it is in the best interest of the United States to award the contract notwithstanding a conflict of interest, a request for waiver shall be submitted in accordance with [9.503](#).
- The waiver request and decision shall be included in the contract file.

**(FAR 9.504)**



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# MITIGATION PLANS



# Key Ways to Deal with OCI

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- **Avoid-** includes excluding certain sources from a competition or eliminate a segment of work from a contract
- **Neutralize-** excluding contractor participation in source selection activities or barring access to sensitive data
- **Mitigate-** Means to reduce or alleviate the impact of an unavoidable OCI. Contractor creates an OCI Mitigation Plan



# OCI Mitigation Plan

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- **Contractor creates a mitigation plan, which proposes actions to identify and reduce actual or apparent OCIs to an acceptable level**
- **Mitigation plan must be based on accurate facts, be reasonable, and be followed**
- **Note: Some OCIs may not be mitigatable. (See Aetna Government Health Plans, Inc, [B-254397.15](#), July 27, 1995 )**



# Common Elements of OCI Plan

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- **Non-Disclosure agreements**
- **Controlled access to sensitive information**
- **Establishment of an employee OCI awareness/compliance program**
- **Physical separation of contract employees from sensitive data**
- **Organizational separation**
- **Management separation**
- **Limitation on personnel transfers**



# Mitigation Plans

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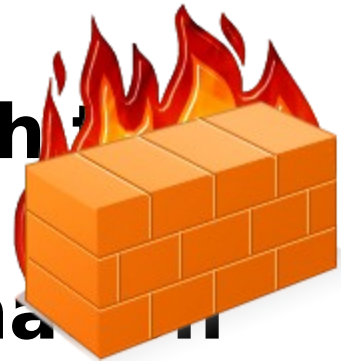
- **All work under the proposed new contract effort should be performed in a division which has no contract responsibilities or management of the existing contract**
- **Plan should address the steps the contractor will take to preclude any perception that it would favor its own products or services; isolate personnel**



# Firewalls - Elements

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- **Define the information covered ( legends)**
- **Identify responsibility for procedure compliance**
- **Agreement on purposes for which information may be used**
- **Procedures to protect the information (security, tracking)**
- **Limits on dissemination (need to know)**
- **Compliance (audits, corrective actions)**

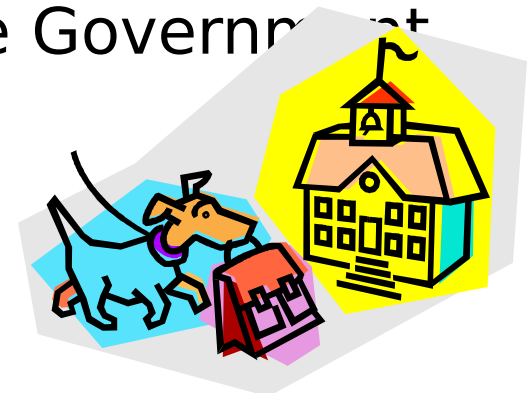




# Mitigation Plans

- **Personnel issues:**

- In-house OCI training – what will existing and new employees be taught?
  - Frequency of training (initial and recurring)
- How is this reinforced?
  - Employee OCI reporting requirements
  - Consequences for OCI violation
  - Disclosure of violations to the Government







# Training

- **In reviewing an OCI mitigation plan, examine various aspects of company training:**
  - New Employees
  - Termination Checklist
  - Proposal Teams
- **Defining who needs the training**
- **Corporate responsibility for ensuring right people receive the training**
- **Examine compliance systems that maintain a tracking system for various training courses**





# Mitigation Plans

- **Personnel issues continuing**

- Employee transfers and separations

- Within-company transfer with Government approval on a case-by-case basis using a nondisclosure agreement
    - Nondisclosure agreements used to address the potential of the employee separating from the company as well





# **Proprietary Information Protection Acknowledgment by Employees**

- **New employees should sign acknowledgment of restrictions on transferring proprietary information of their former employer to their new employer, and sign an agreement to protect the proprietary information of the hiring company**
- **Certification of employees assigned to proposal teams that they have had no exposure to competitors' competition sensitive information within last "X" years either as an government advisor or as the employee of the competitor**
- **Termination checklist includes employee acknowledgment of their obligation to protect the proprietary information of their former company as well as that of third parties**



# Mitigation Plans

- **Personnel issues continued -**
  - Employee compensation issues must also be addressed
  - Will employees' 401(k) plans include company stock?
  - Any profit sharing issues?





# Mitigation Plans

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- **What about company affiliates?**
- **Is there a basis to distinguish them as wholly separate entities?**
- **Are firewalls among divisions of a company sufficient to address impaired objectivity or biased ground rules?** (See the Aetna case B-254397 previously cited)



# Mitigation Plans

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- **For a sample Mitigation Plan Table of Contents go to the following ESC web link and click under “OCI Checkli**



**<https://centernet.hanscom.af.mil/acqdev/PMTB/OCI/default.htm>**



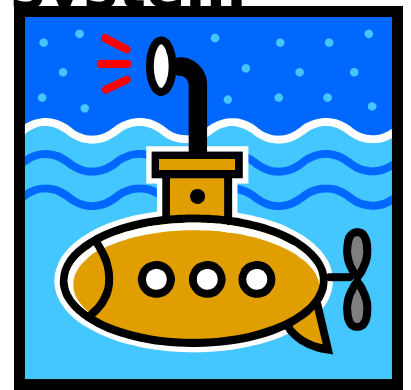
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# FAR EXAMPLES



# FAR Examples

- **a) Company A agrees to provide systems engineering and technical direction for the Navy on the powerplant for a group of submarines (*i.e.*, turbines, drive shafts, propellers, etc.). Company A should not be allowed to supply any powerplant components. Company A can, however, supply components of the submarine unrelated to the powerplant (*e.g.*, fire control, navigation, etc.). In this example, the system is the powerplant, not the submarine, and the ban on supplying components is limited to those for the system only.**



**(FAR 9.508)**





# FAR Examples

- **(b) Company A is the systems engineering and technical direction contractor for system X. After some progress, but before completion, the system is canceled. Later, system Y is developed to achieve the same purposes as system X, but in a fundamentally different fashion. Company B is the systems engineering and technical direction contractor for system Y. Company A may supply system Y or its components**



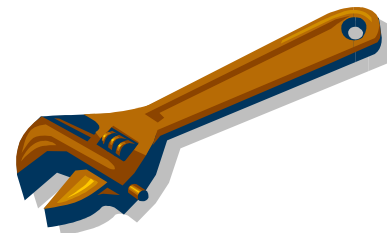
**(FAR 9.508)**



# FAR Examples

- **c) Company A develops new electronic equipment and, as a result of this development, prepares specifications. Company A may supply the equipment.**
- **(d) XYZ Tool Company and PQR Machinery Company, representing the American Tool Institute, work under Government supervision and control to refine specifications or to clarify the requirements of a specific acquisition. These companies may supply the item.**

**(FAR 9.508)**





# FAR Examples

- **e) Before an acquisition for information technology is conducted, Company A is awarded a contract to prepare data system specifications and equipment performance criteria to be used as the basis for the equipment competition. Since the specifications are the basis for selection of commercial hardware, a potential conflict of interest exists. Company A should be excluded from the initial follow-on information technology hardware acquisition.**

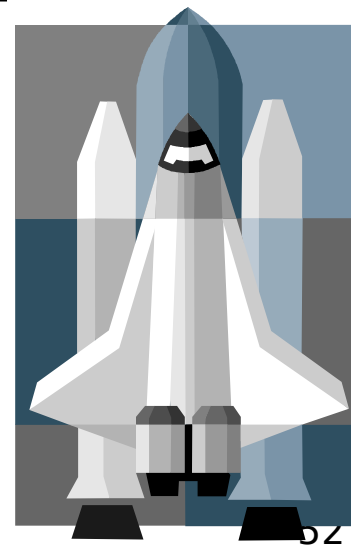


**(FAR 9.508)**



# FAR Examples

- **(f) Company A receives a contract to define the detailed performance characteristics an agency will require for purchasing rocket fuels. Company A has not developed the particular fuels. When the definition contract is awarded, it is clear to both parties that the agency will use the performance characteristics arrived at to choose competitively a contractor to develop or produce the fuels. Company A may not be awarded this follow-on contract.**



**(FAR 9.508)**



# FAR Examples

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- **(g) Company A receives a contract to prepare a detailed plan for scientific and technical training of an agency's personnel. It suggests a curriculum that the agency endorses and incorporates in its request for proposals to institutions to establish and conduct the training. Company A may not be awarded a contract to conduct the training.**

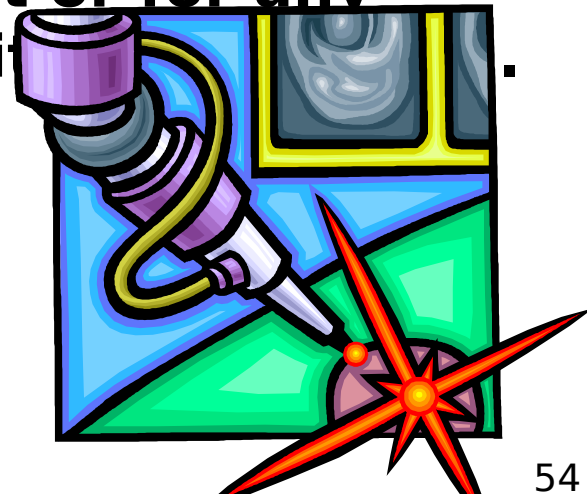


**(FAR 9.508)**



# FAR Examples

- **(h) Company A is selected to study the use of lasers in communications. The agency intends to ask that firms doing research in the field make proprietary information available to Company A. The contract must require Company A to --**
  - (1) Enter into agreements with these firms to protect any proprietary information they provide and**
  - (2) Refrain from using the information in supplying lasers to the Government or for any purpose other than that for which it**



**(FAR 9.508)**



# FAR Examples

- **(i) An agency that regulates an industry wishes to develop a system for evaluating and processing license applications. Contractor X helps develop the system and process the applications. Contractor X should be prohibited from acting as a consultant to any of the applicants during its period of performance and for a reasonable period thereafter.**



**(FAR 9.508)**



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# PROVISIONS AND CLAUSES





# Provisions and Clauses

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- **Significant potential OCIs are normally resolved by imposing some restraint, appropriate to the nature of the conflict, upon the contractor's eligibility for future contracts or subcontracts. Therefore, affected solicitations shall contain a provision that**  
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- (a) Invite offeror's attention to FAR 9.5**
- (b) States the nature of the potential conflict as seen by the contracting officer**
- (c) States the nature of the proposed restraint upon future contractor activities; and**
- (d) Depending on the nature of the acquisition, states whether or not the terms of any proposed clause and the application of this subpart to the contract are subject to negotiation. (FAR 9.507-1)**



# Provisions and Clauses

- **If, as a condition of award, the contractor's eligibility for future prime contract or subcontract awards will be restricted or the contractor must agree to some other restraint, the solicitation shall contain a proposed clause that specifies both the nature and duration of the proposed restraint.**
- **The contracting officer shall include the clause in the contract, first negotiating the clause's final terms with the successful offeror, if it is appropriate to do so.**



**(FAR 9.507-2)**



# Provisions and Clauses

- **The restraint imposed by an OCI clause shall be limited to a fixed term of reasonable duration, sufficient to avoid the circumstance of unfair competitive advantage or potential bias.**
  - **This period varies.**
  - **It might end, for example, when the first production contract using the contractor's specifications or work statement is awarded, or it might extend through the entire life of a system for which the contractor has performed systems engineering and technical direction.**
  - **In every case, the restriction shall specify termination by a specific date or upon the occurrence of an identifiable event.**
- (FAR 9.507-2)**





# Provisions and Clauses

Insert the **clause 5352.209-9002**, Organizational Conflict of Interest, in Section I when the contractor's eligibility for future prime contract or subcontract award shall be restricted because of services being provided as stated in FAR 9.505-1 through 4.

- Insert the **basic clause** when the contractor will be providing systems engineering and/or technical direction (FAR 9.505-1)
- Insert the **basic clause and Alternate I** when the contractor will be preparing specifications or work statements (FAR 9.505-2)
- Insert the **basic clause and Alternate II** when the contractor will be providing technical evaluation or A&AS (FAR 9.505-3)

(AFMC Sup 5309.507-2)



# Provisions and Clauses

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**(Continued)**

- Insert the **basic clause and Alternate III** when the contractor will be obtaining access to proprietary information (FAR 9.505-4)
- Insert the **basic clause and Alternate IV** when the contract is a task ordering contract and when more than one system is supported. The CO may modify Alternate IV to include a list of systems for which task orders may be issued and indicate which OCI provisions apply.

**(AFMC Sup 5309.507-2)**



# Provisions and Clauses

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**(Continued)**

- Insert the **basic clause and Alternate V** when the contract provides for delivery orders. The CO shall indicate which OCI provisions apply.
- Insert the **basic clauses and Alternate VI** when it is necessary to have the restrictions of this clause included in all or some subcontracts, teaming arrangements, and other agencies calling for performance of work related to the contract.

**(AFMC Sup 5309.507-2)**



# Provisions and Clauses

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- **As prescribed in FAR 9.507-1, insert in Section L, the provision at 5352.209-9003, Potential Organizational Conflict of Interest**

**(AFMC Sup 5309.507-2)**





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# MISCELLANEOUS TOPICS





# Miscellaneous Topics - Waiver Process

- The agency head or designee may waive any general rule or procedure of this subpart by determining that its application in a particular situation would not be in the Government's interest. (FAR 9.503)
- Any request for waiver **must be in writing**, shall set forth the extent of the conflict, and requires approval by the agency head or designee. (FAR 9.503)
- The HCA is authorized to waive FAR 9.5 requirements. (AFFARS 5309.503)





# Miscellaneous Topics - **Lead System Integrator**

**“Lead System Integrator”** is defined in DFARS clause  
252.209-7007:

- 1) **“Lead system integrator”** includes “lead system integrator with system responsibility” and “lead system integrator without system responsibility.”
- (2) **“Lead system integrator with system responsibility”** means a prime contractor for the development or production of a major system if the prime contractor is not expected at the time of award, as determined by the Contracting Officer, to perform a substantial portion of the work on the system and the major subsystems.
- (3) **“Lead system integrator without system responsibility”** means a contractor under a contract for the procurement of services whose primary purpose is to perform acquisition functions closely associated with inherently governmental functions (see section 7.503(d) of the Federal Acquisition Regulation) with regard to the development or production of a major system.



# Miscellaneous Topics - Lead System Integrator

- Any entity performing lead system integrator functions in the acquisition of a major system by DoD is **prohibited from having any direct financial interest** in the development or construction of any individual system or element of any system of systems unless an exception applies.



**(DFARS 209.570-2)**



# Miscellaneous Topics - Non-Government Advisors

- If non-government advisors in the performance of advisory and assistance (A&AS) services for the Government require access to proprietary information of other companies, the contracting officer shall ensure that the A&AS contracts contain the appropriate OCI clauses.



**(AFMC FARS 5309.505-4)**



# Miscellaneous Topics - **Non-Government Advisors**

- When non-government advisors will be used in the source selection process, the contracting officer shall ensure compliance with the requirements of AFFARS 5315.305(c)(2) as follows:
  - Non-government advisors **may be used** as necessary to assist in the source selection evaluation.
  - Although advisors may assist in the evaluation and provide input regarding the strengths, deficiencies, and weaknesses in proposals, they shall **not** determine ratings or rankings of offerors' proposals.
  - Non-government advisors shall **not** be the SSA, Chairperson of the SSET/SSAC or a member of or advisor to the Performance Confidence Assessment Group.



# Miscellaneous Topics - **Non-Government Advisors**

If contractor personnel are used as advisors the following applies:

- (i) Access to offeror proposals **shall be restricted** to only those portions for which the individual's expertise is required in the evaluation (e.g., software support contractor only reviews software hours proposed).
- (ii) The contracting officer **shall ensure** that the necessary approval has been obtained in accordance with FAR 37.2.
- (iii) The **solicitation shall list contractors** who will be used, provide notice to prospective offerors that such contractor personnel will be used and the manner in which they will be used, and provide the offeror an opportunity to object to the release of proposal information (see (v) below).

**(AFFARS 5315.305(c)(2))**



# **Miscellaneous Topics - Non-Government Advisors**

**If contractor personnel are used as advisors the following applies: (Continued)**

- (iv) Appropriate Organizational Conflict of Interest (OCI) clauses shall be included under the contract through which the non-government personnel are provided and those non-governmental personnel shall not have any financial interests with any of the offerors.**
  
- (v) If a competing offeror objects to the release of their proposal information to any non-government advisor, the contracting officer shall make a determination whether the non-government advisor(s) shall be permitted to participate in the source selection. The contracting officer shall inform the objecting offeror of the final determination, and, if the use of non-government advisors has been changed, shall inform all offerors of the change.**

**(AFFARS 5315.305(c)(2))**



# Miscellaneous Topics - Non-Government Advisors

- The use of non-government advisors and OCI clauses should be addressed in the Source Selection Plan for acquisitions using the FAR 15.300 source selection procedures as follows:





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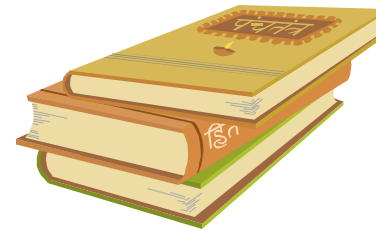
# OCI REFERENCES



# OCI References

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- **FAR 9.5**
- **DFARS 209.5**
- **DFARS PGI 209.5**
- **AFFARS 5309.5**
- **AFMC FARS 5309.5**
- **AFMC IG5309.504**
- **Government-Contractor Relationship Guide  
found at the following web site:**



**<https://www.my.af.mil/gcssaf/USAF/ep/contentView.do?contentType=EDITORIAL&contentId=1396549&channelPageId=-1989826&programId=1397716>**



# OCI References

**AFMC Government Contractor Relationship video,  
Continuous and Topical Training:**

**<https://www.my.af.mil/gcss-af/USAF/ep/contentView.do?contentType=EDITORIAL&contentId=1548624&channelPagelId=-1031932&parentCategoryId=-1032073&programId=875472>**

**DAU course CLC 132, OCI**

**AFFARS Library, Part 9, <https://www.my.af.mil/gcss-af/USAF/ep/contentView.do?contentType=EDITORIAL&contentId=1349009&channelPagelId=-1989826&parentCategoryId=-1989828&programId=1347013>**





# OCI SUMMARY

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- **OCI = Show Stopper**
- **Important to avoid, neutralize, and/or mitigate OCIs before contract award**
- **Government has the responsibility to ensure OCIs are properly handled. The CO must obtain advice of Legal Counsel**
- **Each OCI situation is different and fact-specific**
- **Our ultimate customer is the general public - needs to have absolute confidence in the impartiality of the Government process**
- **Common sense, good judgment and sound discretion is required**